COURT NO.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

INCOME TAX APPLICATION NO.422 OF 2001
(Old No. 99 of 1998)

Commissioner of Income Tax Meerut

..... Applicant

Versus

ONGC as agent of M/s Okanagan Helicopters Ltd.,
Tel Bhavan, Dehradun

..... Opposite Party

Shri S.K. Posti, learned counsel for the applicant.
Sri J.P. Joshi, learned counsel for the opp. party.

Dated: 21.11.2005

Coram: Hon'ble P.C. Verma, J.
Hon'ble J.C.S. Rawat, J.

This is an application under Section 256(2) of the Income Tax Act filed by the Revenue Department seeking a direction from this Court to direct the Income Tax Appellate Tribunal to draw up a statement of case and refer the following question of law as framed in the application to this Court for its decision:-

> ***"Whether on facts and in the circumstances of the case, Ld. ITAT was legally correct in holding that ONGC in the capacity of an agent of non-resident company was not liable for Surtax perquisites to be assessed in its income, whereas the non-resident company was chargeable to Surtax in view of the Notification No.GSR-307-E dated 31.03.1983 issued u/s 24 AA of Companies (Profit) Surtax Act 1964, which was confined to only those cases of non-resident company which had entered into an agreement only with Central Government?"***

The Income Tax Appellate Tribunal (***hereinafter will be referred to as the Tribunal***) vide its order dated 14.08.1997 came to the conclusion that in their opinion, there was no referable question of law arose in the facts and

circumstances of the case and accordingly the learned Tribunal declined to refer the same after relying on the judgment in Income Tax Appeal No.8122(Del)/90 and others, whereby on the same facts and under the similar circumstances, the appeals of the Revenue against orders of the learned CIT (Appeals) was dismissed. The facts of this case are identical as in ITA No.8122 (Del)/90 and others and ITA No.3368(Del)/88, therefore, the learned Tribunal dismissed the appeals. The application was moved by the Department of Revenue giving the statement of fact for which the reference of question was to be decided by the High Court. According to the Revenue, the assessee is non-resident foreign company executing contract with O.N.G.C. The O.N.G.C. has born tax liability on behalf of the non-resident company and the surtax is also payable by O.N.G.C. on behalf of non-resident company. The Assessment Officer worked out the surtax perquisite toward total consideration while quantifying profits under Section 44BB under the I.T. Act. The assessee filed an appeal and relied on Notification No.GSR-307(E) dated 31.03.1983 issued by the Central Government under Section 24AA of Companies (Profits) Surtax Act 1964 and pleaded that the non-resident company was exempted from Surtax under the said notification. The First Appellate Authority also allowed the appeal of the assessee accepting the contention of the assessee that they are exempted in view of the judgment of the Tribunal. In this case, the second Appellate Tribunal also dismissed the appeal of the Revenue Department/applicant relying on the said judgment, which has been referred above. The sole question which ought to have been decided as to whether 'there was any agreement between the Non-Resident Company and the Central Government' and in case, there is an agreement, only then in view of clause (b), the company which had entered into agreement is exempted only.

The learned counsel for the Revenue Sri S.K. Posti submitted at Bar that the reference is pending on the same question of law against the judgment of Income Tax Tribunal No.8122(Del)/90 and others and Income Tax Tribunal No.3368(Del)/88, therefore, the application may be allowed and the statement of the case may be summoned from the Tribunal. We find force in the contention of the learned counsel for the Revenue. Since, the judgment of the Tribunal is subjudice in reference by this Court, therefore it would be just and proper and would be in the interest of justice to allow the application and to direct the Appellate Tribunal to draw a statement of facts and refer the question of law to this Court for its decision.

Therefore, the application is allowed. The Appellate Tribunal is directed to draw a statement of facts and refer the question of law to this Court for its decision.

(J.C.S. Rawat, J.) **(P.C. Verma, J.)**

Rajeev Dang